INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	5
Argument	8
Conclusion	14

CITATIONS

Cases:

Burka v. *Commissioner*, 179 F. 2d 483	14
Burnet v. *Logan*, 283 U. S. 404	9
Curley v. *United States*, 160 F. 2d 229, certiorari denied, 331 U. S. 837	12
Doyle v. *Mitchell Brothers Co.*, 247 U. S. 179	9
Gendelman v. *United States*, 191 F. 2d 993, certiorari denied, 342 U. S. 909	12
Glasser v. *United States*, 315 U. S. 60	11
Gorin v. *United States*, 312 U.S. 19	12
Pierce v. *United States*, 252 U. S. 239	12
Rossi v. *United States*, 289 U. S. 89	13
Southern Pacific Co. v. *Lowe*, 247 U. S. 330	9
Stilson v. *United States*, 250 U. S. 583	12
United States v. *Fleischmann*, 339 U. S. 349	13
United States v. *Hornstein*, 176 F. 2d 217	14
United States v. *Johnson*, 319 U. S. 503	11, 13
United States v. *Link*, 202 F. 2d 592	14
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	11

Statute:

Internal Revenue Code:

Sec. 21 (26 U.S.C. 1946 ed., Sec. 21)	2, 10
Sec. 22 (26 U.S.C. 1946 ed., Sec. 22)	3, 10
Sec. 145 (26 U.S.C. 1946 ed., Sec. 145)	4, 8

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 89

WILLIAM B. STAYBACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 228-239)[1] is reported at 212 F. 2d 313.

JURISDICTION

The judgment of the Court of Appeals was entered April 21, 1954 (R. 240), and the petition for

[1] The record in this Court consists of the separate appendices filed in the Court of Appeals by the appellant and the appellee. References to the appellant's appendix will be designated as "D.", and to that of the appellee as "R."

a writ of certiorari was filed May 21, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Petitioner was indicted and tried for wilfully attempting to defeat and evade his and his wife's income taxes. The Government's proof showed that he had reported only a small fraction of the gross receipts of his business, that he produced no books, that he refused to reveal to the revenue agents any costs offsetting the unreported receipts, and that the Government had determined actual gross income and net income by allowing all deductions which he had claimed in the income tax returns and such other costs as the investigation disclosed. The question presented is:

Whether the Government's proof of petitioner's actual gross income and net income was sufficiently definite to warrant a jury in concluding beyond a reasonable doubt that an additional tax was due and owing.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 21. NET INCOME
>
> (a) *Definition.* "Net income" means the gross income computed under section 22, less the deductions allowed by section 23.
>
> * * * * *
>
> (26 U.S.C. 1946 ed., Sec. 21.)

SEC. 22. GROSS INCOME

(a) *General Definition.* "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions from Gross Income.* * * *

(c) *Inventories.* Whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income.

* * * * *

(n) [as added by Sec. 8(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *Definition of "Adjusted Gross Income".* As

used in this chapter the term "adjusted gross income" means the gross income minus—

(1) *Trade and business deductions.* * * *

(2) *Expenses of travel and lodging in connection with employment.* * * *

(3) *Reimbursed expenses in connection with employment.* * * *

(4) *Deductions attributable to rents and royalties.* * * *

(5) *Certain deductions of life tenants and income beneficiaries of property.* * * *

(6) *Losses from sales or exchange of property.* * * *

(26 U. S. C. 1946 ed., Sec. 22.)

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned

for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

On April 17, 1952, a two-count indictment was returned against petitioner in the United States District Court for the District of New Jersey charging him with having wilfully attempted to defeat and evade his and his wife's income taxes for the calendar years 1943 and 1944, in violation of Section 145(b) of the Internal Revenue Code. (D. 1-3.) After a jury trial lasting approximately three weeks, petitioner was found guilty as charged (D. 16, 221, 250), and on January 30, 1953, he was sentenced to eighteen months imprisonment on each count, the prison sentences to run concurrently, and was fined a total of $3,000 (D. 10). The Court of Appeals affirmed the conviction. (R. 240.)

The evidence to support the verdict may be briefly summarized as follows:

Petitioner was engaged in the manufacture of metal novelties during 1943 and 1944. (D. 28, 82.) He did not file timely income tax returns for those years (D. 17), although an employee prepared a 1943 return for him on March 15, 1944 (R. 167-171, 199-200). Delinquent returns for both years were finally filed after a revenue agent visited his place of business in 1946 and requested that returns be

submitted.[2] (D. 17, 22-24.) The accountant who prepared them obtained his information orally from petitioner since petitioner produced no records. He told the accountant that as nearly as he could remember the total sales from the business, which was his only source of income, amounted to $15,000 in 1943 and $4,000 in 1944. He furnished no figures for costs and expenditures, and the accountant estimated what these must have been on the basis of his own experience in the metal novelty business. Petitioner accepted the accountant's figures as correct. (D. 27-37, 251-258; cf. R. 168.) According to the 1943 return his net income was $7,135 on which the tax was $659.25. (D. 17, 251, 255.) The 1944 return disclosed net income of $578.39 and a tax of $2.35. (D. 20, 256, 258.)

In 1949 the Internal Revenue Service undertook an investigation of these returns. (D. 145-147.) The agents soon discovered that, in addition to operating under his own name, petitioner also carried on business during 1943 and 1944 under the names of W. S. Novelty Company, S. Pannone, Clifford Allen, Harlem Chromium Plating Company, George Wilson Specialty Company, and Universal Alarm Corporation. (D. 53-55, 56-59, 82-86, 111-114; R. 11-21, 31-41, 54, 55-74, 104.) By contacting the customers to whom petitioner had sold merchan-

---

[2] The original delinquent returns were submitted to the revenue agent in April and October 1946. (D. 24.) Amended returns, decreasing the tax liability, were filed on December 13, 1946. (D. 17, 27; R. 4-5.)

dise the agents determined that his total sales amounted to $104,667.38 during 1943 and $59,373.40 during 1944. The returns had, therefore, omitted sales of $89,667.38 in 1943 and $59,373.40 in 1944. (D. 155-157.) The checks received from customers in payment for these sales had frequently been made payable to cash, and they were cashed for petitioner either by the customer or by a check cashing concern instead of being deposited in a bank. (D. 115-119; R. 28, 33-38, 58-59, 64-72, 79-83, 112.) Petitioner's employees received this cash and either turned it over to petitioner or used it to purchase metal for use in the business. (D. 116-122; R. 57-59, 68-72, 77, 79-87, 100.)

After the agents had discovered these unreported sales they informed petitioner of the facts and asked him whether he had records of additional offsetting costs. (D. 150-152.) Petitioner said he could not substantiate any additional costs (D. 164, 173) and his attorney, when asked for such evidence, told the agents that "he did not elect to present any" (D. 164, 170, 199-203; R. 161-163). No records of manufacturing costs were ever presented to the agents, although the investigation was held open for over a year, the evidence of unreported sales was fully explained to petitioner's attorney, and frequent requests were made for information on costs. (D. 170, 173, 199, 202; R. 159-163.) Inquiries were made of petitioner's suppliers, but the only additional cost item the agents could discover during their investigation was approximately $16,000 expended for labor during 1943. (D. 159-160, 164,

169-173, 175-177, 194; R. 166.) Taking this item into account, and allowing all other deductions claimed in the returns, the Government computed a tax deficiency of $49,130.15 for 1943 and $32,-195.04 for 1944. (D. 158-164.)

The only other evidence of manufacturing costs at the trial was the vague testimony of petitioner's employee, Allen, that he bought lead at $500 or $600 a ton about once a week (D. 112-122), and the testimony of petitioner's wife that they used only two or three tons of metal in 1943 at a cost of $200 a ton (R. 196-198).

The trial judge carefully charged the jury that the burden was on the Government to prove beyond a reasonable doubt that petitioner owed additional taxes over and above those reported in his returns. He distinguished net income from gross income, and he told the jury the Government could not prove additional taxes simply by showing unreported sales, but that it must show further that these sales, after deduction of costs for materials and labor, resulted in net taxable income in excess of that reported by petitioner. (D. 223-228, 230-232.) The specific instructions presented by the defense on this aspect of the case were given by the court substantially as requested. (D. 243-244, 246-247.)

ARGUMENT

In order to establish a violation of that portion of Section 145(b) of the Internal Revenue Code (*supra*, pp. 4-5) under which petitioner was indicted, the Government must prove (1) that an additional

income tax was due and owing; (2) that an attempt was made to evade this additional tax; and (3) that the attempt was wilful. Petitioner's sole concern (Pet. 11) is with the first of these three elements. He does not challenge the proof of the other two. He contends that the courts below erroneously permitted the Government to compute his income tax. for 1943 and 1944 on the basis of his gross receipts, without deducting the cost of goods sold, instead of on the basis of his gross income (Pet. 9-14); and that, therefore, the burden was improperly shifted to him to prove, both what his gross income was, and that he owed no additional taxes (Pet. 14-15). In brief, petitioner's contention is that the Government's evidence was insufficient to establish that additional taxes were due.

We submit that the Government determined petitioner's gross income with sufficient definiteness to provide the basis for a conclusion beyond a reasonable doubt that he did owe taxes over and above those reported in his returns. We agree with petitioner that "gross receipts" is a broader term than "gross income", that all returns of capital must be excluded from the former in order to obtain the latter, and that the determination of gross income is an essential step in the computation of the tax. *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330, 335; *Burnet* v. *Logan,* 283 U. S. 404, 413; *Doyle* v. *Mitchell Brothers Co.,* 247 U. S. 179, 185. The tax is, of course, ultimately computed on the basis of net income, determined by the elimination of all non-income receipts and allowable deductions. Be-

ginning with gross receipts, excludible items (life insurance, annuities, gifts, etc.) and returns of capital (determined, where necessary, by the use of inventories) are eliminated to obtain gross income. Gross income minus allowable business deductions equals adjusted gross income, and this latter, minus allowable deductions for non-business expenditures, equals net income. Sections 21 and 22, Internal Revenue Code (*supra*, pp. 2-4).

This is exactly the method by which the Government determined petitioner's net income for the taxable years involved in this case. The Government started with a figure representing the gross receipts for each particular year, a figure vastly exceeding that appearing in the return because of the numerous unreported sales uncovered by the investigation. (*Supra*, pp. 6-7.) The Government could not determine whether any portion of these unreported receipts represented an offsetting return of capital expended for raw materials, supplies and labor, with the exception of the $16,000 item for labor in 1943. Frequent requests addressed to petitioner and his attorney, to whom the full extent of the unreported sales had been made clear, failed to evoke any pertinent information, and inquiries made of petitioner's suppliers were fruitless. (*Supra*, p. 7.) In order to determine petitioner's gross income, therefore, the Government subtracted from his actual gross receipts the $16,000 labor item in 1943 and the cost of raw materials and supplies as reported in the returns. Adjusted gross income was then determined by

subtraction of other business deductions as reported by petitioner. Finally, net income was determined by subtraction of the reported non-business deductions. (D. 155-163, 251-258; see Pet. 3-7.) As to the Government's figure for actual gross receipts, and as to the last two steps in the above computation, there is no dispute.[3] (Pet. 3, 4, 11.) The only question is whether the Government's case must fail because the agents could discover no additional offsetting costs of labor and materials, or whether, to state the converse, the Government established a substantial amount of unreported gross income with sufficient definiteness to permit a jury to conclude beyond a reasonable doubt that additional income taxes were due and owing.

It was, of course, unnecessary for the Government to prove the exact amount of the evaded tax. The prosecution sustained its burden if it proved the evasion of some substantial amount. *United States* v. *Johnson,* 319 U. S. 503, 517. And the Government's evidence was sufficient to support the verdict if reasonable minds, regarding that evidence in the light most favorable to the Government, could conclude beyond a reasonable doubt that petitioner had evaded some substantial amount of his taxes. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 254; *Glasser* v. *United States,*

[3] Although the Court of Appeals said (R. 233) that there was no dispute as to the Government's "gross income" figures, the context of the opinion shows that the term was being used in the sense of "gross receipts" (R. 231-233; see Pet. 8, 11).

315 U. S. 60, 80; *Gorin* v. *United States,* 312 U. S. 19, 32; *Pierce* v. *United States,* 252 U. S. 239, 251-252; *Stilson* v. *United States,* 250 U.S. 583, 588-589; *Curley* v. *United States,* 160 F. 2d 229, 232-233 (C.A. D.C.), certiorari denied, 331 U. S. 837; *Gendelman* v. *United States,* 191 F. 2d 993, 995 (C.A. 9th), certiorari denied, 342 U. S. 909. The Government's proof clearly met this test.

In the first place, while it is undisputed that the returns understated by a wide margin petitioner's total sales or gross receipts,[4] the evidence shows that only a certain percentage of these receipts represented offsetting costs or return of capital. When petitioner's accountant, Primoshic, prepared the delinquent returns he drew on his accounting experience to determine these costs at a certain percentage of the total sales and petitioner agreed that this computation was correct. (*Supra,* p. 6.) Liebman, the accountant who testified for petitioner at the trial, also appears to have recognized that deductible costs represented only a portion of total sales. (See colloquy D. 217-218; R. 206-207.) Consequently, since gross income was so largely understated in the returns, the only logical inference is that net income was also understated in proportion, and that a substantial amount of the correct tax was evaded.

Furthermore, petitioner's conduct during the investigation points inevitably to the conclusion

[4] The total sales of his business represented his annual gross receipts since he had no other source of income. (D. 251-252, 256-257.)

that, if he had produced all the evidence of his manufacturing costs, his net income would then clearly be seen to have been substantially understated. When the first agent who visited him in 1946 requested returns for 1943 and 1944 he presented returns which so grossly understated his true receipts that it is inconceivable that he could have been mistaken, and, in fact, no such contention has been made. And when the agents, after further investigation, confronted him with the evidence of unreported sales, neither he nor his attorney, despite frequent requests, would present any substantiation of offsetting costs. Meanwhile, inquiries directed to petitioner's suppliers failed to produce evidence of additional costs. Obviously, even if there were any additional costs, and even if they had been deducted from the actual gross receipts, there still would have remained a substantial amount of unreported gross income.

The force of a *prima facie* case may not be defeated by such "skilful concealment." *United States* v. *Johnson,* 319 U. S. 503, 517-518. Since the circumstances fairly indicated that there were no costs to offset the greater portion of the unreported sales, it was not incumbent on the Government to adduce further positive evidence in support of this negative proposition. *United States* v. *Fleischman,* 339 U. S. 349, 360-364; *Rossi* v. *United States,* 289 U. S. 89, 91-92. This was not a case in which petitioner himself was the only person who could testify in contradiction of the Government's case. (Pet. 15.) If he actually had

offsetting expenses for material, his suppliers were certainly available to him. Where the Government has established unreported gross income and where it has allowed all deductions claimed by the taxpayer in his returns and such others as it can determine by a complete investigation, and where the taxpayer when confronted with the results of the investigation refuses to produce evidence of further deductions, a reasonable jury may conclude beyond a reasonable doubt that there were no sufficient additional deductions to make any substantial difference in the Government's case. See *United States* v. *Link*, 202 F. 2d 592, 593-594 (C.A. 3d); *United States* v. *Hornstein*, 176 F. 2d 217, 220 (C.A. 7th); cf. *Burka* v. *Commissioner*, 179 F. 2d 483, 485 (C.A. 4th).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
DAVID L. LUCE,
JOSEPH M. HOWARD,
Special Assistants to the Attorney General.

JUNE, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 904971 1900